

A Garden Arcade Sdn Bhd v Boulder Built Construction Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO 22–56 OF 2005
LAU BEE LAN J
17 OCTOBER 2005

B

Civil Procedure — Interim injunction — Application to set aside injunction obtained ex parte — Injunction to restrain the defendant from encroaching and trespassing the plaintiff's land — Whether there was suppression of material facts by plaintiff in obtaining injunction — Whether there was a serious question to be tried — Balance of convenience

C**D**

The plaintiff is the registered proprietor of Lot 1117 Block 233 Kuching North Land District, a parcel of vacant land of 39.1 sq metres in size ('Lot 1117'). The defendant is the registered proprietor of Lot 1116 Block 233 Kuching North Land District ('Lot 1116'). Lot 1117 is bounded on its three sides by Lot 1116. The plaintiff contended that the defendant had encroached and trespassed on Lot 1117 damaging the plaintiff's property and had wrongly removed earth therefrom. In support of the contention, they relied on photographs taken. The plaintiff applied ex parte for an injunction to be granted that the defendant whether by themselves, their servants or agents or otherwise be restrained from encroaching and/or trespassing into the plaintiff's land and that the defendant whether by themselves, their servants or agents or otherwise be restrained from removing and/or disposing off earth from Lot 1117 and that the defendant whether by themselves, their servants or agents or otherwise be restrained from continuing with earth leveling works and removal of earth near Lot 1117. The plaintiff was granted the ex parte interim injunction. On the outset, the defendant took strong objection to the plaintiff's non disclosure and suppression of material facts.

E**F****G Held:**

- (1) It cannot be denied that the plaintiff did not at the inter parte hearing of the plaintiff's application disclosed to the court its complaint of trespass to the Land and Survey Department; its follow-up letter to Enforcement Division of Land and Survey Department, Kuching enquiring about the outcome of the investigation pertaining to the earthworks on Lot 1116 and whether any action has been taken on the owner of Lot 1116 for trespassing and encroaching into Lot 1117; and the existence of a reply vide letter from the Land and Survey Department informing that the licence issued to the defendant had been terminated as the removal of earth from Lot 1116 has been completed and a land inspection job by the Enforcement Division confirmed that the earth removal works had not encroached onto Lot 1117. However, it is to be noted that based on the affidavit affirmed to support the plaintiff's ex parte for interim injunction, it was averred that prior to the plaintiff's application above, the plaintiff had filed an ex parte application for interlocutory injunction, but withdrew the same at the hearing before the High Court, in order to facilitate

H**I**

the plaintiff to fully comply in particular with the requirements of O 29 r 1(2A) of the Rules of the High Court 1980. Therefore, it can be inferred that the plaintiff did not intend to suppress any material fact from the court. In the circumstances, the court accepted the explanation given by the plaintiff and found that they were not guilty of suppression and non disclosure of facts before the court (see paras 17–18).

(2) Following the principles outlined in the case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, the court was of the view that in the light of the pleadings and the affidavit evidence, the issue of whether there is trespass or otherwise is a serious question to be tried. At this stage, the contentious matters between the parties are matters which the court has to refrain from any determination on the merits of the claim or defence (see para 23).

(3) On the facts of the case, there was no encroachment or trespass by the defendant onto the plaintiff's land and the defendant had stopped the earthworks which was confirmed by the letter from the Land and Survey Department that the licence issued to the defendant had been terminated which means that the removal of earth would have been completed. In light of these findings, it follows that the basis upon which the interim injunction was sought for no longer exist. Therefore, there exist justification for the interim injunction (see para 25).

[Bahasa Malaysia summary

Plaintif adalah tuan punya berdaftar bagi Lot 1117 Blok 233, Kuching, Daerah Selatan Darat untuk sebidang tanah yang kosong, 39.1 persegi meter dalam saiz ('Lot 1117'). Defendan adalah tuan punya berdaftar bagi Lot 1116 Blok 233 Kuching, Daerah Selatan Darat ('Lot 1116'). Lot 1117 adalah bersempadan dengan tiga bahagian oleh Lot 1116. Plaintif berhujah bahawa defendan telah mencero bohi Lot 1117 merosakkan harta plaintif dan telah tersalah mengeluarkan tanah dari dalamnya. Dalam menyokong penegasan atau hujahan ini, mereka bergantung kepada gambar-gambar yang telah diambil. Plaintif telah memohon satu injuksi secara ex parte agar defendan samada oleh mereka, kakitangan mereka atau agen-agen mereka atau jika dihalang daripada mencero bohi tanah plaintif dan bahawa defendan sama ada oleh diri mereka, kakitangan mereka atau agen-agen atau jika dihalang daripada mengeluarkan dan/atau melupuskan tanah daripada Lot 1117 dan defendan sama ada oleh diri mereka, kakitangan-kakitangan atau agen-agen mereka dihalang daripada meneruskan dengan kerja-kerja meratakan tanah dan pengeluaran tanah berdekatan Lot 1117. Plaintif telah diberikan ex parte interim injuksi. Pada permulaannya, defendan telah membantah secara kerasnya kepada ketakdedahan dan penyekatan fakta-fakta plaintif.]

Diputuskan:

(1) Tidak boleh dinafikan bahawa plaintif tidak pada tahap pendengaran inter parte bagi permohonan plaintif mendedahkan kepada mahkamah aduan pencerobohan kepada Jabatan Tanah dan Penyasatan, surat susulan kepada

- A** bahagian penguatkuasa Tanah dan Penyiasatan, Kuching bertanya tentang hasil penyiasatan kerjatanah ke atas Lot 1116 dan sama ada sebarang tindakan telah diambil ke atas tuan punya Lot 1116 bagi tujuan mencero bohi Lot 1117 dan jawapan melalui surat daripada Jabatan Tanah dan Penyiasatan memaklumkan bahawa lesen yang dikeluarkan kepada defendan telah ditamatkan kerana tanah telah habis dikeluarkan daripada Lot 1116 dan kerja pemeriksaan tanah oleh Bahagian Penguatkuasa mengesahkan bahawa kerja pengeluaran tanah tidak mencero bohi Lot 1117. Walau bagaimanapun, berdasarkan kepada affidavit yang diikrarkan untuk menyokong ex parte interim injuksi plaintif adalah ditegaskan bahawa sebelum permohonan plaintif di atas, plaintif telah memfailkan permohonan ex parte bagi injuksi interlocutori tetapi telah menarik balik yang sama pada perbicaraan di hadapan Mahkamah Tinggi bagi memudahkan plaintif mematuhi keperluan-keperluan O 29 r 1(2A) Kaedah-kaedah Mahkamah Tinggi 1980. Oleh itu, boleh dikatakan bahawa plaintif tidak bermaksud untuk menyekat sebarang fakta material daripada mahkamah. Dalam keadaan sedemikian, mahkamah telah menerima penjelasan yang diberikan oleh plaintif dan mendapati bahawa mereka tidak bersalah terhadap penyekatan dan ketakdedahan fakta-fakta dihadapan mahkamah (lihat perenggan 17–18).
- B**
- C**
- D**
- (2) Mengikut prinsip di dalam kes *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, mahkamah adalah berpendapat bahawa dalam pliding dan keterangan affidavit, isu samada wujudnya pencerobohan atau tidak adalah sesuatu soalan yang serius dan perlu dibicarakan. Pada tahap ini, perkara-perkara yang dipertikaikan antara kedua-dua pihak adalah perkara-perkara yang mana mahkamah perlu menghindar dari sebarang keputusan ke atas merit-merit tuntutan atau pembelaan (lihat perenggan 23).
- E**
- F** (3) Daripada fakta-fakta kes, defendan tidak mencero bohi tanah plaintif dan defendan telah menghentikan kerjatanah yang mana telah diesahkan melalui surat daripada Jabatan Tanah dan Penyiasatan bahawa lesen yang dikeluarkan kepada defendan telah ditamatkan yang bermaksud kerja pengeluaran tanah sudah tamat. Dalam penemuan ini, adalah berikutan bahawa dasar di mana interim injuksi diberikan tidak lagi wujud. Oleh itu, terdapat justifikasi bagi kewujudan interim injuksi (lihat perenggan 25).]
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Notes

For cases on interim injunction, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2769–2830.

H Cases referred to

- American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 (refd)
Chan Foo Keong v Nilai Chempaka Sdn Bhd [1994] 1 CLJ 125 (refd)
Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd [1996] MLJU 357 (refd)
I *Damayanti Kantilal Doshi v Jigarlal Kantilal Doshi* [2004] 1 MLJ 456 (refd)
Datuk Syed Kechik bin Syed Mohamed v Datuk Yeh Pao Tzu & Ors [1997] 1 MLJ 56 (refd)
Fellowes & Son v Fisher [1975] 2 All ER 829 (refd)
K Mahunaran v Osmond Chiang Siang Kuan [1996] 5 MLJ 293 (refd)

- Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 (folld) **A**
- Kepong Industrial Park Sdn Bhd v Teoh Seng Aun & Ors* [1999] 5 MLJ 688 (refd)
- Kwong Hing Realty Sdn Bhd v Malaysia Building Society Bhd (American International Assurance Co Ltd, Third Party)* [1997] 5 MLJ 670 (refd)
- Lim Sung Huak v Syarikat Pemaju Tanah Tikam Batu Sdn Bhd* [1993] 3 MLJ 527 (refd) **B**
- MBF Holdings Bhd v East Asiatic Co (Malaysia) Bhd* [1995] 3 MLJ 49 (refd)
- Noor Jahan bte Abdul Wahab v MD Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 (refd)
- Ong Heok & Anor v Ooi Bee Tat & Ors* [1982] 2 MLJ 326 (refd)
- Pekeliling Triangle Sdn Bhd v Chase Perdana Bhd* [2003] 1 MLJ 130 (refd) **C**
- Pernas Hotel Chain (s) Sdn Bhd v Waltz Fitness Recreation Sdn Bhd* [1993] 2 CLJ 102 (refd)
- Professor Dr A Kahar Bador v N. Krishnan & 8 Ors* [1983] 1 MLJ 407 (refd)
- Salcon Engineering Sdn Bhd v PRM Energy Systems (M) Sdn Bhd* [1993] 3 MLJ 64 (refd) **D**
- Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor* [1994] 3 MLJ 530 (refd)
- Societe Generale & Ors v City Holdings (Pte) Ltd & Anor* [1991] 2 MLJ 212 (also [1990] SLR 1151) (refd)
- Tan Wee Choon v Ong Peck Seng & Anor* [1986] 1 MLJ 322 (refd)
- Tien Ik Sdn Bhd & Ors v Peter Kuok Khoon Huong* [1992] 2 MLJ 689 (refd) **E**

Legislation referred to

Rules of the High Court 1980 O 29 r 1(2A)
Specific Relief Act 1950 s 41

- Sbeena Chuah (Chan Chia Chuan with her) (Griffin Associates) for the intended plaintiff.* **F**
- Chan Kay Heng (Chan & Chan Advocates) for the intended defendant.*

Lau Bee Lan J:

BACKGROUND **G**

[1] The intended plaintiff (now plaintiff in the Suit herein) vide a summons in chambers application dated 4 May 2005 applied ex parte for the following orders:

- (a) an injunction be granted that the intended defendant whether by themselves, their servants or agents or otherwise be restrained from encroaching and/or trespassing into the intended plaintiff's land which is known as Lot 1117 Block 233 Kuching North Land District and situated at 7th Mile, Penrissen Road, Kuching, Sarawak; **H**
- (b) that the intended defendant whether by themselves, their servants or agents or otherwise be restrained from removing and/or disposing off earth from the Lot 1117 Block 233 Kuching North Land District which is situated at 7th Mile, Penrissen Road, Kuching, Sarawak; **I**

- A** (c) that the intended defendant whether by themselves, their servants or agents or otherwise be restrained from continuing with earth levelling works and removal of earth near and/or on and/or from Lot 1117 Block 233 Kuching North Land District which is situated at 7th Mile, Penrissen Road, Kuching, Sarawak; and
- B** (d) that the intended defendant do pay the intended plaintiff the costs of this application as ('the plaintiff's application').
- C** [2] Pursuant to the plaintiff's application, the plaintiff was granted an ex parte order for interim injunction dated 5 May 2005. On 20 May 2005 the date fixed for the inter partes hearing of the plaintiff's application, the learned counsel for the intended defendant (now defendant in the suit herein) had objected to the words 'near and/or' in paragraph 3 of the said order and after hearing parties, the court accepted and granted the defendant counsel's oral application to delete the words
- D** 'near and/or' in paragraph 3 of the said order. The inter partes hearing of the plaintiff's application was adjourned to 25 August 2005 upon the request by the plaintiff to file in the affidavit in reply.
- E** [3] The plaintiff filed and served on the defendant the writ of summons dated 26 May 2005 and the statement of claim dated 25 May 2005. The defence and reply have been filed correspondingly.
- F** [4] The plaintiff's application is supported by the affidavit of Chai Ted Fui affirmed on 4 May 2005 ('Chai's affidavit') (encl 4); affidavit in reply of Chai Ted Fui affirmed on 3 June 2005 ('Chai's affidavit in reply') (encl 16); affidavit in reply II of Chai Ted Fui affirmed on 25 June 2005 ('Chai's affidavit in reply II') (encl 26); and affidavit in reply III of Chai Ted Fui affirmed on 25 July 2005 ('Chai's affidavit in reply III') (encl 35).
- G** [5] The defendant opposed the plaintiff's application vide the affidavit in opposition of Yeo Pek Seng affirmed on 18 May 2005 ('Yeo's affidavit in opposition') (encl 10); affidavit in reply of Yeo Pek Seng affirmed on 10 June 2005 ('Yeo's affidavit in reply') (encl 18); and affidavit in reply II of Yeo Pak Seng affirmed on 11 July 2005 ('Yeo's affidavit in reply II') (encl 31).
- H** [6] Briefly the facts in this case are as follows. The plaintiff is the registered proprietor of Lot 1117 Block 233 Kuching North Land District, a parcel of vacant land of 39.1 sq metres in size as 'Lot 1117' or ('the plaintiff's land') as is evident by a copy of the memorandum of transfer and issue document of title of Lot 1117, exh CTF-3 and CTF-4 respectively. This is because prior to this, on or about 27 August
- I** 2002, the plaintiff had entered into a sale and purchase agreement (exh CTF-1) with Sarawak Electricity Supply Corporation ("SESCO") to purchase from SESCO Lot 1117. The consent in writing from the Director of Lands and Surveys for the transaction was obtained on 13 April 2004 as is evident from the letter addressed to Messrs Sia, Alvin Wong & Partners, exh CTF-2. Thereafter the memorandum of transfer to effect the transfer of ownership of Lot 1117 from SESCO to the plaintiff

was executed on 9 September 2002 and registered at the Land and Survey Department Kuching, Sarawak on 24 April 2004 as shown by exh CTF-3 and CTF-4 referred to earlier. The plaintiff's land is classified to be used only as an electrical tower in accordance with the provisions of the Electricity Ordinance as per paragraph (i) under the Restrictions and Special Conditions contained in exh CTF-4. The defendant is the registered proprietor of Lot 1116 Block 233 Kuching North Land District ('Lot 1116' or 'the defendant's land') as is evident by a copy of the print out title, exh CTF-5. Lot 1117 is bounded on its three sides by Lot 1116 as shown by the Locality Plan, exh CTF-6. The defendant's land is classified to be used as a site for a water tank in accordance with the provisions of the Water Supply Ordinance as per paragraph (i) under the special conditions contained in exh CTF-5.

[7] Based on Chai's affidavit sometime in March 2005, the plaintiff erected a wooden fence around the boundary of Lot 1117 based on the boundary pegs which were erected previously by SESCO, the previous owner of Lot 1117. On or about end of March 2004, SESCO had without the knowledge and consent of the plaintiff granted permission to the defendant to level Lot 1117 and to remove earth from the said Lot. Upon knowing this, the plaintiff queried SESCO regarding the permission given to remove earth from Lot 1117 vide its letter dated 29 March 2005, exh CTF-7 which was carbon copied to the defendant. On or about 29 April 2005, the plaintiff received a letter from SESCO dated 22 April 2005, exh CTF-9 stating that the approval for the leveling and removal of earth from Lot 1117 would be cancelled and they admitted that the approval was given by their Regional Office in good faith as they were unaware of the ownership of the land and they have further informed the defendant to liaise with the plaintiff on any matter pertaining to Lot 1117. The defendant had on or about the end of March 2005 commenced leveling and removal of earth on Lot 1116. Vide its own letter dated 1 April 2005, exh CTF-10 and on 23 April 2005 vide a letter from its solicitors, Messrs Griffin Associates (exh CTF-1), the plaintiff had given warning to the defendant not to encroach and or to trespass into Lot 1117.

[8] On the other hand, the defendant's version goes like this. Based on Yeo's affidavit in opposition, the defendant had obtained planning approval for the subdivision of Lot 1116 for the building of 6 units of shophouses and this is evident from the letter of Land and Survey Department, Kuching to the defendant's consultant conveying planning approval dated 4 March 2004, exh A. The defendant then applied to SESCO for its consent to cut and remove earth from Lot 1117 so as to reduce its level to that of the defendant's shophouses project earth level. Notwithstanding having obtained SESCO's consent and payment of an agreed sum to SESCO, the Defendant averred that they did not enter Lot 1117 or cut or remove any earth therein because paragraph 3(iv) of the planning approval stipulated that no earth works on the site can be carried out until engineering plans for the project have been approved. After its engineering plans were approved on 3 March 2005, the defendant then commenced earthworks on Lot 1116, by cutting and removing earth from Lot 1116. The defendant averred that in cutting and removing the earth from Lot 1117, they had stopped at a distance of more than 3.8m from the boundary of Lot 1117 and for this they relied on their consultant's sketch plan drawn after site inspection on 13 May 2005, exh B. The defendant averred that at all material times

- A** neither the defendant, its workers or agents entered upon Lot 1117 and they further averred that a fence had been erected by the plaintiff around but outside the boundary of Lot 1117, ie on parts of Lot 1116.

PLAINTIFF'S CONTENTION

- B** [9] The plaintiff contended that the defendant had on 26 April 2005 proceeded to encroach and trespass on to Lot 1117 damaging the plaintiff's property and had wrongly removed earth therefrom. In support of the contention, they relied on photographs taken on 26 April 2005 exhibited as exh CTF-12. Further, the plaintiff
- C** disputed that the defendant had complied with the approved plan No SPA/46-03/ID-PMC (TP 78/01) referred to in paragraph 3(i) of exh A which they alleged made a provision that the boundary of the defendant's earthworks shall be at least 6m from the boundary of Lot 1117 and in this case, the defendant had only allowed for a distance of 3.8m. Further, it is the plaintiff's contention that there is a requirement of a 'buffer zone' of at least 10 feet between the boundary of earthworks
- D** and the boundary of the adjacent land by relying on a letter dated 5 April 2005 from the Land and Survey Department of Samarahan Division which they believed is a requirement applicable throughout Sarawak. In addition, the plaintiff produced a surveyor's report dated 20 June 2005, exh CTF-22 which showed that the survey was done on 7 June 2005 and basing on this surveyor's report, the plaintiff claimed it
- E** confirmed that the defendant had in fact encroached onto the plaintiff's land. The plaintiff had also produced photographs, CTF-24 and CTF-25 taken on 26 April 2005 which they alleged showed that the earth had slid down or had been removed by the defendant prior to the plaintiff's application being made and photograph exh CTF-26 taken on 16 July 2005 which they alleged showed that the state of the slope had changed little in form. In support of their contention, the learned counsel for the
- F** plaintiff, Ms Sheena Chuah assisted by Mr Chan Chia Chuan cited the following authorities:
- (i) Specific Relief Act 1950 s 41;
 - (ii) *Tan Wee Choon v Ong Peck Seng & Anor* [1986] 1 MLJ 322;
 - G** (iii) *Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor* [1994] 3 MLJ 530;
 - (iv) *Kwong Ring Realty Sdn Bhd v Malaysia Building Society Bhd (American International Assurance Co Ltd, third party)* [1997] 5 MLJ 670;
 - (v) *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504;
 - H** (vi) *MBf Holdings Bhd v East Asiatic Co (M) Bhd* [1995] 3 MLJ 49;
 - (vii) *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193;
 - (viii) *Datuk Syed Kechik bin Syed Mohamed v Datuk Yeh Pao Tzu & Ors* [1997] 1 MLJ 56;
 - I** (ix) *Ong Heok & Anor v Ooi Bee Tat & Ors* [1982] 2 MLJ 326;

- (x) *Societe Generale & Ors v City Holdings (Pte) Ltd & Anor* [1991] 2 MLJ 212; [1990] SLR 1151; and
- (xi) *K Mahunaran v Osmond Chiang Siang Kuan* [1996] 5 MLJ 293.

DEFENDANT'S CONTENTION

[10] The defendant contended that they had not encroached or trespassed onto the plaintiff's land and neither had they removed any earth therefrom as borne out by the photographs, exh CTF-12 and they had left a buffer zone of about 3.8m distance to the boundary of Lot 1117 at its narrowest point and also a distance of approximately 5.5m, 6.8m and 6.5m on the other surrounding sides as depicted in exh B. In support of their contention, learned counsel for the defendant, Mr Chan Kay Heng cited the following authorities:

- (i) *Pernas Hotel Chain (s) Sdn Bhd v Waltz Fitness Recreation Sdn Bhd* [1993] 2 CLJ 102;
- (ii) *Tien Ik Sdn Bhd & Ors v Peter Kuok Khoon Huong* [1992] 2 MLJ 689;
- (iii) *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd* [1996] MLJU 357;
- (iv) *Keet Gerald*; and
- (v) *Pekeliling Triangle Sdn Bhd v Chase Perdana Bhd* [2003] 1 MLJ 130.

FINDINGS

[11] The plaintiff's action is premised on trespass and encroachment which is not disputed by the defendant. According to the plaintiff, the defendant had trespassed onto the plaintiff's land, Lot 1117 on 26 April 2005 based on the photographs, exhs CTF-12, CTF-24, CTF-25 and CTF-26 and on the surveyor's report, exh CTF-22. The question is, has the plaintiff proven that the defendant had trespassed or encroached onto the plaintiff's land, Lot 1117?

[12] I believe that both the learned counsel for the plaintiff and defendant have no dispute as to what constitutes 'trespass'. Based on the authorities submitted by counsel for the plaintiff and defendant, it is sufficient for me to refer to the definition of 'trespass' as follows:

- (i) *Halsbury's Laws of England* (3rd Ed) Vol 38 at p 739 which states:

Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. A person trespasses upon land if he wrongfully sets foot on, or rides or drives over it, or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or, it seems, if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water from another's land, or sends filth or any injurious substance which has been collected by him on his own land on to another's land.

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- (ii) *Kwong Hing Realty Sdn Bhd* wherein KC Vohrah J (as he then was) at p 678 referred to a passage in *Clerk & Lindsell on Torts* (17th Ed) at p 837 as follows:

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[T]respass to land consists of any unjustifiable intrusion by one person upon the land in the possession of another. What is relied on for this principle is one of the earliest commentaries on the subject, Bl Comm, Vol 3 209;

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Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit*. For every man's land is in the eye of the law inclosed and set apart from his neighbours; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field.

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[13] The locus classicus on the law governing application for interlocutory injunction is the *American Cyanamid* case, the principles of which has been fairly summarised by Sir John Pennycuik in *Fellowes & Anor v Fisher* [1975] 2 All ER 829 at p 843 as follows:

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- (1) Provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a *prima facie* case.

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- (2) The court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory relief.

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- (3) As to that the court should first consider whether, if the plaintiff succeeds, he would be adequately compensated by damages for the loss sustained between the application and the trial, in which case no interlocutory injunction should normally be granted.

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- (4) If damages would not provide an adequate remedy (the court should then consider whether if the plaintiff fails the defendant would be adequately compensated under the plaintiff's undertaking in damages, in which case there would be no reason on this ground to refuse an interlocutory injunction.
- (5) Then one goes on to consider all other matters relevant to the balance of convenience, an important factor in the balance should this otherwise be even, being preservation of the status quo. By the expression 'status quo' I understand to be meant the position prevailing when the defendant embarked on the activity sought to be restrained. Different considerations might apply if the plaintiff delays unduly his application for relief.

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- (6) Finally, and apparently only when the balance still appears even, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence.

(per Yusof J (as he then was) in *Datuk Syed Kechik bin Syed Mohamed*.

[14] In approaching the plaintiff's application, I would adopt the procedure and principles which have been lucidly established in *Keet Gerald* which approved of the

principles propounded in the *American Cyanamid* case where Gopal Sri Ram JCA (delivering judgment on behalf of the Court of Appeal) opined at p 207:

To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:

- (1) *he must ask himself whether the totality of the acts presented before him discloses a bona fide serious issue* to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. *Above all, he must refrain from making any determination on the merits of the claim or any defence too it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial.* If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;
- (2) *having found that an issue has been disclosed that requires further investigation he must consider where the justice of the case lies.* In making his assessment, he must take into account all relevant matters, *including the practical realities of the case before him.* He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail and in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and
- (3) *the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo,* an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, *such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity such as an award of monetary compensation* in the event that he succeeds in establishing his claim at the trial. *Any question going to the public interest may, and in appropriate cases should, be taken into account.* A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion. (Emphasis added.)

[15] The defendant took strong objection to the plaintiff's non disclosure and suppression of material facts which Mr Chan Kay Heng had particularised in paras 1–18 at pp 3–5 of his written submission, encl 40 and he cited the following cases:

- (i) *Pernas Hotel Chain (Sarawak) Sdn Bhd v Waltz Fitness Recreation Sdn Bhd* [1993] 2 CLJ 102;

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(ii) *Salcon Engineering Sdn Bhd v PRM Energy Systems (M) Sdn Bhd* [1993] 3 MLJ 64;

(iii) *Chan Foo Keong v Nilai Chempaka Sdn Bhd* [1994] 1 CLJ 125;

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(iv) *Professor Dr A Kahar Bador & Ors v N Krishnan & Ors* [1983] 1 MLJ 407;

(v) *Damayanti Kantilal Doshi v Jigarlal Kantilal Doshi* [2004] 1 MLJ 456;

(vi) *Kepong Industrial Park Sdn Bhd v Teoh Seng Aun & Ors* [1995] 5 MLJ 688; and

(vii) *Lim Sung Huak v Syarikat Pemaju Tanah Tikam Batu Sdn Bhd* [1993] 3 MLJ 527.

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[16] Relying on the aforesaid reported cases, he has urged the court not to set aside the ex parte interim injunction automatically but has invited the court to take into consideration the several opportunities which the plaintiff had to disclose the fact of its complaint of trespass to the Land and Survey Department and the existence of the reply that there was no encroachment and it elected not to do so.

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[17] It cannot be denied that the plaintiff did not at the inter partes hearing of the plaintiff's application fixed on 20 May 2005 disclosed to the court its complaint of trespass to the Land and Survey Department vide letters dated 7 April 2005 and 28 April 2005, exhs CTF-I7 and CTF-18 respectively; its follow-up letter dated 11 May 2005 to Enforcement Division of Land and Survey Department, Kuching enquiring about the outcome of the investigation pertaining to the earthworks on Lot 1116 and whether any action has been taken on the owner of Lot 1116 for trespassing and encroaching into Lot 1117, exh CTF-19; and the existence of a reply vide letter dated 10 May 2005, exh CTF-20 from the Land and Survey Department informing that the licence issued to the defendant had been terminated on 29 April 2005 as the removal of earth from Lot 1116 has been completed and a land inspection job by the Enforcement Division on 4 May 2005 confirmed that the earth removal works had not encroached onto Lot 1117. It is correct that all the above documents were only produced in Chai's affidavit in reply which was affirmed on 3 June 2005 and pursuant to the direction of the court to produce the same upon the request made by Mr Chan Kay Heng. Be that as it may, the plaintiff had proffered the following explanation for non disclosure in the following manner:

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(i) CTF-18 and CTF-19 were queries made by the plaintiff to the Land and Survey Department to seek its assistance to resolve the matter and they were unaware of the investigation carried out by the Enforcement Officers of the Land and Survey Department.

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(ii) It was only on 18 May 2005 that the plaintiff received a reply from the Land and Survey Department vide a letter dated 10 May 2005, exh CTF-20 indicating that they have done a land inspection on 4 May 2005 and therefore CTF-20 was still not available to the plaintiff to be produced as an exhibit in Chai's affidavit affirmed on 4 May 2005 to support the plaintiff's ex parte summons in chambers for interim injunction.

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(iii) It was stated in Chai's affidavit in reply that there was insufficient time for the plaintiff to affirm an affidavit and exhibit the said letter (exh CTF-20) which

was received by the plaintiff on 18 May 2005 and the plaintiff's advocates production of the said letter during the 2nd hearing (20 May 2005) would have constituted it as a statement from the Bar and rendered it inadmissible.

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[18] However, it is to be noted that based on Chai's affidavit affirmed on 4 May 2005 to support the plaintiff's ex parte summons in chambers for interim injunction filed on the same date, it was averred that prior to the plaintiff's application above, the plaintiff had on 29 April 2005, filed an ex parte application for interlocutory injunction, but withdrew the same at the hearing on 30 April 2005 before the Honourable Judge of High Court I, in order to facilitate the plaintiff to fully comply in particular with the requirements of O 29 r 1(2A) of the Rules of the High Court 1980 ('the RHC'). Therefore, it can be inferred that the plaintiff did not intend to suppress any material fact from the court. In the circumstances, I accept the explanation given by the plaintiff and I find that they are not guilty of suppression and non disclosure of facts before the court.

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[19] I observe from the authorities cited by Mr Chan Kay Heng and with respect to the approach adopted by the court for inter partes application when there is material non disclosure, it is either to adopt a lenient or a strict approach. In this context, I refer to the case of *Damayanti Kantilal Doshi* where the Court of Appeal after referring to the case of *Salcon Engineering Sdn Bhd and Noor Jahan bte Abdul Wahab v MD Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 ruled that the court should not take a narrow and strict interpretation of O 29 r 1(2A) of the RHC but should still consider whether the justice of the case require the continuance of the ex parte order or its revocation based on the facts adduced at the inter partes hearing of the application for injunction notwithstanding the earlier failure of the plaintiff to make such disclosure. Following the principle propounded in *Damayanti Kantilal Doshi*, the learned counsel for the defendant was correct in his approach when he invited the court not to automatically set aside the ex parte interim injunction for the non disclosure but to consider the justice of the case.

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[20] As has been alluded earlier, exh CTF-20 is significant in the sense that it showed that the Land and Survey Department had unequivocally stated that the licence to remove earth dated 19 January 2005 was terminated on 29 April 2005 as the removal of earth from Lot 1116 had been completed and a land inspection job done on 4 May 2005 confirmed that the earth removal works had not encroached on Lot 1117 as alleged by the plaintiff. The learned counsel for the plaintiff had submitted that the finding by the Enforcement Division of the Land and Survey Department goes against the weight of the available evidence and exhibits and it was improper of the Enforcement Division to carry out the said inspection which should in fact be the task of the Surveying Division and therefore the finding of the Enforcement Division of Land and Survey Department is irrelevant and highly questionable.

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[21] It is to be remembered that exh CTF-20 is an official letter being a reply from the Land and Survey Department to a query from the plaintiff themselves. There is nothing in the said letter which would cause the court to be suspicious of the contents therein, for example, fraud or illegal tampering. In this context, the word

- A 'Lot 1116' which appeared in the title and in the second paragraph of the letter instead of 'Lot 1116' which was made an issue of by the plaintiff is shown to be a mere typographical error and this is confirmed by the Land and Survey Department vide its letter dated 10 June 2005, exh CTF-27 in response to the plaintiff's query for clarification on the word 'Lot 1116'.
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- C [22] Taking the legal definition of 'trespass' referred to earlier, I find that exh P20 has factually and categorically stated that there has been no encroachment onto the plaintiff's land. So I agree with Mr Chan Kay Heng's submission, what then is the justification for the interim injunction? The plaintiff and the defendant had submitted their own surveyor's report which were carried out on 7 June 2005, exh CTF-22 and on 5 July 2005, exh C respectively and these surveys were done after 26 April 2005, the material date on which the defendant had averred they had stopped their earthworks and which was not rebutted by the plaintiff. The veracity of the defendant's evidence that they had stopped earthworks on 26 April 2005 is fortified by the confirmation from the Land and Survey Department that the licence for removal of earth issued to the defendant was terminated on 29 April 2005 as removal of earth from Lot 1116 has been completed.
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- E [23] Apart from the conflicting surveyor's reports, there is also the dispute between the plaintiff and the defendant with respect to the requirement of the buffer zone allowance needed to be maintained by the defendant between the boundaries of Lot 1117 and Lot 1116, the argument of whether there was earth slippage/erosion or whether there was trespass and the bona fides of the plaintiff's application to deter the defendant from carrying on its project to build shophouses and the possibility of the plaintiff holding the defendant at ransom by attempting to resolve the matter through the sale of the whole shophouse project to them at their price are matters for the court to contend with. Following the principles outlined in the case of *Keet Gerald*, I am of the view that in light of the pleadings and the affidavit evidence, including the submissions of counsel, I find that the issue of whether there is trespass or otherwise is a serious question to be tried. At this stage, the contentious matters between the parties are matters which the court has to refrain from any determination on the merits of the claim or defence (see *Keet Gerald* at p 206). Having found that there is a serious question to be tried, I have to consider the justice of the case and weigh all the matters, including the content of exh CTF-20, and decide whether it warrants me to continue the interim injunction or to revoke it. I have also to be mindful that the remedy for the interim injunction is discretionary 'intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo (see *Keet Gerald* at p 208). When weighing the evidence contained in exh P20 vis-a-vis the surveyor's reports, exh CTF-22 and exh C and the photographs, particularly exh CTF-26, I find that exh CTF-20 pertains to evidence which is closest in time to the date ie 26 April 2005 when the plaintiff alleged the defendant had trespassed or encroached onto the plaintiff's land and wrongfully removed earth therefrom. As I have mentioned earlier, exh CTF-20 has in crystal clear terms stated that there is no encroachment onto the plaintiff's land, Lot 1117 in the course of the earth removal works done by the defendant on their land, Lot 1116. Hence, to reiterate, what is the purpose of the interim injunction?
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[24] At this juncture, I wish to point out that in the statement of claim, the plaintiff had, inter alia, prayed for:

- (i) *A mandatory Injunction that the defendant do forthwith construct a retaining wall surrounding Lot 1117 Block 233 Kuching North Land District;*
- (ii) *An injunction to restrain the defendant whether by themselves or by their servants or agents from further continuing with their construction works on Lot 1116 Block 233 Kuching North Land District until the retaining wall surrounding Lot 1117 Block 233 Kuching North Land District has been completed. (Emphasis added.)*

[25] However, in the plaintiff's application, the orders prayed for are essentially (i) an injunction to restrain the defendant from encroaching and/or trespassing into the plaintiff's land, Lot 1117; (ii) to restrain the defendant from removing and/or disposing off earth from Lot 1117; and (iii) the defendant be restrained from continuing with earth leveling works and removal of earth on or from Lot 1117. I have made a finding that there is no encroachment or trespass by the defendant onto the plaintiff's land and the defendant had stopped the earthworks on 26 April 2005 and which is confirmed by the letter from the Land and Survey Department, exh CTF-20 that the licence issued to the defendant had been terminated on 29 April 2005 which means that the removal of earth would have been completed prior to that date. In the light of these findings, it follows that the basis upon which the interim injunction was sought for no longer exist. It is to be noted that the plaintiff did not in its application seek for a mandatory injunction for the defendant to construct a retaining wall surrounding Lot 1117 and neither did the plaintiff apply to restrain the defendant from continuing with their construction on Lot 1116 as pleaded in its statement of claim. Therefore notwithstanding some reference to the retaining wall in the plaintiff's written submission, I am precluded from considering this matter because it is not the relief prayed for by the plaintiff in its application in the first place.

[26] In the circumstances and for the reasons aforesaid, I order that the plaintiff's summons in chambers dated 4 May 2005 and the court's order dated 5 May 2005 and 20 May 2005 be dismissed and revoked respectively and costs be in the cause. However, upon the oral application of Mr Chan Kay Heng to address the court on the question of costs, wherein he submitted that costs should be awarded to the defendant because (i) the plaintiff was guilty of non disclosure of facts and (ii) in a matter which is contentious, the successful party should be compensated with costs unless the said party has conducted himself in an obnoxious way to move the court to deprive him of costs Mr Chan Kay Heng further submitted in this instant case that the defendant was not guilty of such conduct whereas the plaintiff ought to have taken cognisance of exh CTF-20 and should have withdrawn its application at its earliest opportunity. Upon hearing the parties, I had decided to vary the order of costs in the cause to one of costs for the defendant to be paid by the plaintiff and to be taxed unless otherwise agreed.

Order accordingly.

Reported by Peter Ling